

OGC REVIEW COMPLETED

Washington, D.C. 20505

Honorable John M. Harmon
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear John:

This is in response to your request dated 23 May for comments to your draft "umbrella" procedures that would govern all the specific procedures which are subject to Attorney General approval pursuant to the requirements of Executive Order 12036.

I would first like to offer a general comment on a matter which is more procedural than substantive. Once the substantive aspects of your draft are finalized you may want to consider their being cast in the form of a letter from the Attorney General to the heads of the various departments and agencies concerned. You will see from my specific comments below that I believe that several of the aspects of your draft could best be dealt with in this form. It may be that such a format is the best for the entire subject. Our current plan would be to take those aspects of your draft that are applicable to each of the specific procedures required by the Order and incorporate them into each of those specific procedures. In that way each of our specific procedures will be complete in itself. We believe that this will greatly reduce confusion that would occur if our operators are required to refer to several documents for guidance on any one particular subject. Each of the subjects of the required procedures is complicated enough. We should try to avoid the unnecessary confusion that would be caused by a need to refer to several documents for guidance as to a particular subject.

My specific comments are organized to correspond with the order of presentation of your draft.

I. SCOPE: Would the word "individually" have a more precise connotation than "specifically" in the first sentence? I would suggest that the last sentence of this paragraph would more correctly read "These procedures are in addition to procedures to be established by the heads of those agencies and approved by the Attorney General."

II. DEFINITIONS:

1. "Agent of a foreign power." This definition is so general as to offer little or no guidance to those who must try to evaluate whether an individual qualifies within the scope of the term. I believe that its generality will create false hopes in those in the intelligence community who may now be happy with its apparent expansive scope because in reality such a definition may cause the Attorney General to reject specific applications which rely on this expansiveness even though those applications are made in good faith. I strongly suggest that we now address specific categories of individuals and entities such as that in the definition for this term which I previously proposed. I do not want to imply that I am wedded to the specifics of our definition, but I think that that approach will serve us far better in the long run than avoiding those issues through the use of generalities now.

3. "Collection." I suggest that the first sentence could be ended after the second "agency." I would add "and information about such a particular known person is intended to be acquired" after "surveillance" in the last sentence.

4. "Consent." I believe this definition unnecessarily limits the scope of the case law on this subject. For example, it makes no provision for either of the parties to a conversation--particularly the party other than the target--consenting to the overhearing or recording of that conversation. Your definition would require the subject of the activity or investigation to have given his consent. I also question the necessity for a particular consent to be in writing. I would not preclude such but would also not require it. Thus, I would suggest the beginning of this definition be changed to "Activities undertaken on the basis of 'consent' including activities where (1) one of the parties to the activity has specifically consented to the particular activity; (2)...." I would also add that those subject to the regulations of an agency should be able to consent via regulatory notice.

6. "Activities for which a warrant would be required if undertaken for law enforcement purposes." I am puzzled by what is being attempted here. It is difficult to understand how this is a definition. I question its utility for those operators who will have to use these procedures for daily guidance. For the most part, at least, I think the import of the paragraphs of this section can be best handled by a guidance letter. Incidentally, I don't understand the circumstances being described in the second paragraph that would require a General Counsel opinion. A literal reading would seem to necessitate a written opinion even for a consented physical search. Lastly, I would hope that information indicating a threat to life or other physical harm resulting from an activity undertaken because of "exigent circumstances" which was subsequently disapproved by the Attorney General could be disseminated to appropriate law enforcement authorities.

11. "In United States postal channels." A literal interpretation of this definition would seem to prohibit an agency mail room from opening the mail addressed to a specific official of that agency. At least with respect to CIA that would impose an intolerable burden, particularly for certain of our senior officials.

12. "Law enforcement." I question the need for this definition. Its breadth may initially please some collectors of information on the one hand; yet I suspect in the long run it may be a disservice as it has the potential of ensnaring the sources and methods of the intelligence community in criminal and civil litigation. As you know, all too frequently such necessitates the public revelation of these sources and methods, much to our agony.

13. "Lawful counterintelligence, personnel, physical or communications security investigation." I do not believe that this paragraph amounts to a definition. It is more confusing than helpful. On the one hand it might be read as a limitation on the proper investigation of an agency's own employees while on the other hand it could be read to authorize improper investigation of those outside an agency.

14. "Least intrusive means possible." I believe that the subject of this paragraph is another which could be best dealt with in a guidance letter. In any event, should not "feasible" in the second sentence be "reasonable?"

15. "Physical search." I believe that this subject should be directed to what the Executive Order prohibits; that is "unconsented physical searches." For this term I would propose that:

'Unconsented physical search' means a physical intrusion upon or search of a person or person's property or possessions for purposes other than placing an electronic surveillance or electronic or mechanical monitoring device, without the consent of the person or, in the case of property or possessions, of another individual who has authority to consent to such a search. This term includes the opening of any mail sent by or intended to be received by a United States person but does not include any activity for which a warrant is not required if that activity is undertaken by a law enforcement agency for a law enforcement purpose.

16. "Physical surveillance." This definition does not seem consistent with that in the Executive Order itself. I would again propose using that of the Order with clarification such as:

'Physical surveillance' means an unconsented, systematic and deliberate observation of a person by any means on a continuing basis, or unconsented acquisition or nonpublic communication by a

person not a party thereto or visibly present thereat through any means not involving electronic surveillance. This definition does not include overhead reconnaissance not directed at specific United States persons, but does include any use, even a one-time use, of a non-readily available electronic or mechanical device to aid the normal sight or hearing of the observer monitoring or observing the activities or presence of such a person when that person has not consented to such monitoring or observation and when such activities or presence is outside the sight or hearing of such an observer. Non-readily available devices do not include eyeglasses, binoculars, lighting devices, hearing aids or similar commonly used devices.

17. "Use any electronic or mechanical device surreptitiously and continuously to monitor." Again, I believe that the definition that I previously proposed more squarely addresses the relevant issues and provides concrete guidance. That definition was:

'Use any electronic or mechanical device to surreptitiously and continuously monitor any person within the United States or any United States person abroad'

(1) means:

(a) using a television camera, movie camera, high power telescope, or similar device to surreptitiously and continuously view or record the activities of a particular person within the United States or particular United States person abroad without the consent of such person when such activities occur in a private place;

(b) using a directional microphone or similar electronic device to surreptitiously and continuously overhear or record an oral communication of a particular person in the United States, or a particular United States person abroad without the consent of one of the parties to such communication, in circumstances where the person monitoring or recording the communication is visibly present at the place of communication but is not a party to that communication, and is outside the hearing range of that communication;

(c) attaching a "beeper" or similar electronic tracking device to an object or vehicle of a person within the United States or a United States person abroad without the consent of such person when that object or vehicle:

- (i) is in a private place; or
 - (ii) is to be the subject of an unconsented physical entry or search.
- (2) does not include the use of any such device:
- (a) for electronic surveillance;
 - (b) to determine the mere presence or absence of a person or object in a private place;
 - (c) to monitor an area and that is not directed at a particular person;
 - (d) to monitor the training of CIA employees provided that such trainees are advised before the initiation of such training that such monitoring may be undertaken and such employees give their express consent to such monitoring;
 - (e) to record the activities of a person in the United States or a United States person abroad that could be perceived by the unaided sight or hearing of the operator of the equipment.

It may be well to add to this your thought such as "monitoring is 'continuous' if it is conducted over a substantial period of time without substantial interruption."

From these last few comments you will see that it is my view that we should be very particular regarding the scope of §§2-203, 204-205 and 206. I strongly believe that the scope of §§2-203 and 204-205 should be limited to the scope of current case law in these subjects. Other such activities about which current case law either doesn't deal or is in conflict should be left to the regulation by procedures promulgated pursuant to §2-206.

III. REQUESTS

1. Change "legality" of the second sentence of this paragraph to "the legal sufficiency." Add "or Acting General Counsel" after "General Counsel" in this same sentence.
2. Change paragraph b to begin "A statement of the facts and circumstances relied upon to justify the belief of the head of the agency...."

Change "likely" in paragraph d to "expected."

I have little confidence that we can meet the requirements of paragraph e. As you probably know in most, if not all, of our current operations we do not

for several reasons minimize the acquisition now. Based on the circumstances of many of those operations, I question how we could do that in the future. Thus, I cannot envision how we could even begin to describe how we would plan to minimize when in fact in many cases we just cannot do it during acquisition.

I seriously question how an agency such as CIA can be expected, particularly given the legislative prohibition against its being involved in law enforcement, to competently or capably judge facts required in paragraph h.

If I can provide further detail on any or all of these comments prior to your general meeting, do not hesitate to give me a call. Otherwise, I will look forward to our exploring all of these matters in further detail when we meet with all of the departments and agencies concerned with these subjects.

Sincerely,

Anthony A. Lapham
General Counsel